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No. 81

In the Supreme Court of the United States

October Term, 1930.

HENRY CHOUTEAU, *Petitioner,*

vs.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth District.

BRIEF ON BEHALF OF THE PETITIONER.

T. J. LEAHY,
Pawhuska, Oklahoma,
C. S. MACDONALD,
Pawhuska, Oklahoma,
JAMES H. MAXEY,
Tulsa, Oklahoma,
F. W. FILES,
Pawhuska, Oklahoma,
LOUIS N. STIVERS,
Osage Tribal Attorney,
Pawhuska, Oklahoma,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

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No. 81

HENRY CHOUTEAU, *Petitioner,*

vs.

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth District.

BRIEF on BEHALF of the PETITIONER.

Statement.

This case is in this court on writ of *certiorari* to the Circuit Court of Appeals of the United States for the Tenth Circuit in which it is sought to reverse the judgment and order of said court affirming the judgment by the United States Board of Tax Appeals rendered in favor of this respondent and against this petitioner by said Board on the 9th day of February, 1929 (R. 11), and involving income tax for the years 1918, 1919 and 1920. The matter was heard

by the Board of Tax Appeals on the petition of this petitioner for a redetermination by said Board of the deficiency claimed against him for said years, the answer of this respondent filed with said Board and an agreed statement of facts filed by the parties hereto. The petition for redetermination of the tax filed with the United States Board of Tax Appeals is found on pages 2, 3, 4, 5, 6 and 7 of the transcript of record, the answer of the Commissioner of Internal Revenue is found on pages 7 and 8 of the transcript of record. The agreed statement of facts is found on pages 9 and 10 of the transcript of record. The petition for review of the decision of the United States Board of Tax Appeals filed with the United States Circuit Court of Appeals is found on pages 13, 14 and 15 of the transcript of record. Judgment Circuit Court of Appeals (R. 33). Opinion Circuit Court of Appeals (R. 26) 38 Federal (2nd Series) 976, Certificate of Competency (R. 17).

Jurisdiction of this court is conferred by the judicial code, section 240-A, as amended by the Act of February 13, 1925, and as provided by Rule 38 of the revised rules of this court adopted June 5, 1928, effective July 1st, 1928, and that the date of the judgment to be reviewed is February 5, 1930.

The facts relied upon by this petitioner as grounds for a reversal of the order of the United States Circuit Court of Appeals affirming the judgment of the Board of Tax Appeals are substantially as follows:

1. The petitioner is a member of the Osage tribe of Indians, duly allotted as such under the Act of Congress of

June 28, 1906 (34 Stat. L. 539), commonly known as the Osage Indian Allotment Act; that under said Act he was allotted his portion of the lands and monies belonging to the Osage tribe of Indians, but was not allotted his proportionate part of the minerals under said land belonging to the said Osage tribe, said minerals being reserved to the tribe for a period of twenty-five years from April 8, 1906. The income of the tribe derived from said minerals, after deducting the expenses incurred in conducting the affairs of the Osage tribe, was distributed among the members of the tribe and placed in the Treasury of the United States to the credit of such members.

2. The income of the petitioner, which is involved in this controversy is his part of the net income received by the Osage tribe, and which was paid out to him as provided by said Act of Congress, also income received by him as an heir of another member of the Osage tribe of Indians, such income being derived from the same source. There is no income involved in this action, except that derived from tribal sources.

3. This petitioner is and was at all times duly enrolled as a member of the Osage tribe of Indians, and sustained, and still sustains tribal relations with said tribe.

4. The income in the first instance being the income of the Osage tribe of Indians was not subject to the income tax law of the United States. Congress did not attempt to tax said income nor did it require a fiduciary return to be made by or for said tribe, showing the amount of income or its

distribution among share owners, as is provided for by fiducaries.

5. The funds belonging to the tribe and while belonging to the members of the tribe after distribution and before being paid out is a trust fund, and being a trust fund in the hands of the Government will not be taxed except by specific legislation therefor.

The United States Circuit Court of Appeals for the Tenth Circuit (38 Federal Reporter 2nd, page 976), passing upon this case, held that because this petitioner had a certificate of competency (R. 17) the income in question became subject to the Federal Income Tax laws. In a companion case (*Blackbird* v. *Commissioner of Internal Revenue,* 38 Federal 2nd, 976), the court held that because Mary Blackbird did not have a certificate of competency, her income received from the same source as the income of this petitioner, was not subject to the Federal Income Tax law. It will be our purpose in this brief to show to the court that not only was the Circuit Court of Appeals right in holding that the income of Mary Blackbird was not subject to the Federal Income Tax, but that the court erred in holding that the income of this petitioner was subject to Federal Income Tax laws, because he had a certificate of competency. It will be urged that the Circuit Court of Appeals erred in construing the effect of the certificate of competency as entirely relieving the petitioner from governmental restrictions or control and placing him in the same class as a citizen of the United States and a non-member of an Indian tribe.

ASSIGNMENTS *of* ERROR.

The errors complained of are as follows:

1. The Circuit Court of Appeals erred in holding that because this petitioner, who is a duly enrolled and allotted member of the Osage tribe of Indians, had a certificate of competency his proportionate part of the income of the tfibe was, when distributed to him, subject to an income tax.

2. The court erred in holding, in effect, that the petitioner is no longer a ward of the Govrenment.

3. The Circuit Court of Appeals erred in sustaining the United States Board of Tax Appeals in rendering judgment in favor of this respondent and against this petitioner.

PROPOSITIONS.

The petitioner presents this case to the court on the following propositions:

1. The Osage tribe of Indians is not included among those presons, firms, corporations, *et cetera* required to file an income tax return or a fiduciary return.
2. The status of the petitioner is that of a restricted member of the Osage tribe of Indians.

3. The income received by the Osage tribe of Indians is an income which Congress may not impose tax against under the Constitution of the United States.

4. Congress has not attempted to tax the income of the Osage tribe of Indians, either in the hands of the tribe or on distribution among the members thereof.

5. The income of the tribe not being subject to a tax, it cannot become subject to a tax on distribution.

6. The status of the income of an Osage Indian, heir of another Osage Indian, is the same as the income received by him as an allottee.

7. The funds received by members of the Osage tribe of Indians from tribal sources is in the nature of a gift and not an income.

ARGUMENT.

I.

The Osage tribe of Indians is not included among those persons, firms, corporations, *et al.*, required to file an income tax return, or a fiduciary return.

The list of persons, firms, corporations, *et al.*, who are required to make an income tax or fiduciary return does not, either directly or indirectly by inference or otherwise, include an Indian tribe. An Indian tribe is a different kind or character of entity from any of those sought to be taxed or whose shareholders or members are taxed. It does not include an Indian tribe by inference in the intention of Congress for the reason that it is foreign to and in conflict with the policy of the Government to attempt to impose a tax upon an Indian tribe, or the members thereof.

The Constitution of the United States regards Indian tribes as a distinct entity. It provides that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." (Section 8, Article 1.)

These tribes have been repeatedly held by various decisions of the Supreme Court to be a semi-dependent political body, with certain rights to govern themselves, and to control their internal affairs, unless the same is taken away from them by Acts of Congress or by treaty.

—*Cherokee Nation* v. *Georgia*, 5 Peters 1;
Worcester v. *Georgia*, 6 Peters 515;

United States v. *Kagama*, 118 U. S. 375;
United States v. *Rickert*, 188 U. S. 432;
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In re Sah-quah, 31 Fed. 329;
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United States v. *Nice*, 241 U. S. 591;
United States v. *Quiver*, 241 U. S. 602;
United States v. *Merriam*, 263 U. S. 179.

In *Cherokee Nation* v. *Georgia, supra,* Chief Justice MARSHALL referring to the clause in the constitution giving Congress power to regulate commerce with the Indian tribes, said:

> "In this clause they are as clearly contradistinguished by a name appropriate to themselves from foreign nations as from the several states composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption."

In the case of *United States* v. *Lariviere, supra,* the court said:

"From the commencement of the Government, the United States has negotiated with the Indians in their tribal condition as nations; dependent, it is true, but still capable of making treaties, and this was only following the practice of Great Britain before the revolution. In *Worcester* v. *Georgia, supra,* the court said: The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having such definite and well understood meaning. We have applied them to the Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In *Re Sah-quah,* the court used the following language:

"From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their respective tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts, and the manner of their enforcement, marriage, descents, and the punishments for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints were from time to time deemed necessary for their own protection and that of the whites adjacent to them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16, 17; *Jackson* v. *Goodell,* 20 Johns. 193."

In *Worcester* v. *Georgia, supra,* which was a case involving the relations of the Cherokee Indians to the United

States and the right of the State of Georgia to control in any way the lands or individuals residing within the boundaries of the Cherokee Nation in the State of Georgia, the court, by Chief Justice MARSHALL, in the opinion, among other things, said:

"The third article acknowledges the Cherokees to be under the portection of the United States of America, and of no other power.

"This stipulation is found in Indian treaties generally. It was introduced into their treaties with Great Britain; and may probably be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

"The general law of European sovereigns, respecting their claims in America, limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others. This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown as a dependent

ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

"This is the true meaning of the stipulation, and is undoubtedly the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise.

"The same stipulation entered into with the United States, is undobtedly to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledged themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. * * *

"The fourth article declares that 'the boundary between the United States and the Cherokee Nation shall be as follows: beginning,' etc. We hear no more of 'allotments' or of 'hunting-grounds.' A boundary is described, between nation and nation, by mutual consent. The national character of each; the ability of each to establish this boundary, is acknowledged by the other. * * *

"From the commencement of our government Congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States. * * *

"The treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union. * * *

"The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties; extending to them first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self government—by associating with a stronger and taking its protection. * * *

"The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which, the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the Acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the Government of the United States."

Prior to the Louisiana Purchase the Osage tribe of Indians was under the jurisdiction of France, but by reason of that purchase they became subjects of the United States. On November 10, 1808, the United States entered into a

treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (Kappler's Laws and Treaties, Vol. 2, p. 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "*Art. 6.* And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations, respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to-wit: Beginning at Fort Clark, on the Missouri, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States, all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the River Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be laid off in such manner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty provides:

> "*Art. 10.* The United States receives the Great and Little Osage Nations into their friendship and under their protection; and the said nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer

their lands to any foreign power, or to citizens of the United States, or to inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Lousiana Purchase on the part of the Unted States to assume the position of guardian and protector of the Osage tribe.

On September 12, 1815, after the close of the War of 1812, the United States again entered into a treaty with the Osage tribe of Indians, for the purpose of re-establishing peace and friendship between the United States and the said tribe of Indians. (Kappler's Laws and Treaties, Vol. 2, p. 119.) The preamble to said treaty reads as follows:

"The parties being desirous of re-establishing peace and friendship between the United States and the said tribe or nations, and of being placed in all things, in every respect, on the same footing on which they stood before the war, have agreed to the following articles."

And article 3 reads as follows:

"*Art. 3.* The contracting parties, in the sincerity of mutual friendship recognize, re-establish, and confirm, all and every treaty, contract and agreement, heretofore concluded between the United States and the said Osage tribe or nations."

Again on September 25, 1818, a treaty was entered into between the Osage Nation and the United States, whereby the Osage Nation ceded certain lands to the United States, and the United States agreed upon certain boundary lines as being the boundary line between the land owned by the Osage tribe of Indians and the United States. (Kappler's Laws and Treaties, Vol. 2, p. 167.)

The Treaty of June 2, 1825 (Kappler's Laws and Treaties, Vol. 2, p. 217), contains the preamble:

> "In order to more effectually extend to said tribes that protection of the Government so much desired by them, it is agreed as follows."

Then follows a treaty consisting of fourteen articles. In the fourteenth article is found the language:

> "These articles shall take effect, and become obligatory upon the contracting parties, as soon as the same shall be ratified by the president by and with the advice and consent of the Senate of the United States."

On January 11, 1839 (Kappler's Laws and Treaties, Vol. 2, p. 525), the United States entered into a treaty with the Osage tribe of Indians, article 3 of which reads as follows:

> "This treaty shall be binding on both parties when ratified by the United States Senate."

On September 29, 1865 (Kappler's Laws and Treaties, Vol. 2, p. 878) another treaty was entered into between the United States and the Osage tribe of Indians, article 10 of which expressed the dependency of the Osages upon the United States, and reads as follows:

"*Art. 10.* The Osages acknowledge their dependency on the Government of the United States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians, and they further agree to use their best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

"*Art. 17.* Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the senate and approved by the president."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this Act Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and Acts of Congress mentioned above establish the trust relation be-

tween the United States and the Osage tribe of Indians, but the United States, as a further evidence of such relationship, received from the Cherokee Nation in trust for the Osage tribe a deed for the lands, from which it now receives its mineral rights and these same minerals are now held by the United States under such trust deed (R. 17). The same thereby became a federal agency, by which the United States has endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to said tribe and held in trust by the United States.

It is specifically stated in said deed:

"This indenture, made and entered into this fourteenth day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, *in trust for the use and benefit of the Osages and Kansas Indians,* of the second part, witnesseth, that * * * (Italics ours.)

"*Whereas,* by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of One Million, Ninety-nine Thousand, One Hundred and Thirty-seven and forty-one Hundredth Dollars ($1,099,137.41), in payment for said tract of land. * * *

"*Therefore,* by authority of an Act of the Nation

al Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three. * * *

"Said party of the first part, by the aforesaid principal chief, and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas river, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these presents bargain, sell, remise, release, relinquish and confirm unto the said party of the second part forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory embracing the following townships, and fractional townships north and east of the Indian meridian. * * *"

Further evidencing the intention of the Government to retain control over the mineral resources of the tribe it is provided in the Act of Congress of June 28, 1906 (34 Stat. L. 539-543), as follows:

"That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas and other minerals, covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: *Provided*, that the royalties to be paid to the Osage tribe under any mineral

lease so made shall be determined by the President of the United States; and *provided further*, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *provided, however*, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

This is the only form of alienation of these minerals possible under the law.

In the seventh paragraph of section two of said Act of Congress of June 28th, 1906, it is provided:

"That nothing herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided."

II.

Status of the petitioner is that of a restricted member of the Osage Tribe of Indians.

The petitioner is a member of the Osage tribe of Indians duly enrolled as such under the Act of Congress of June 28, 1906. At the time of the passage of said Act, his status as an Indian was the same as every other member of the Osage tribe regardless of the quantum of blood—in fact no distinction was made between members of the tribe on the question of the quantum of blood until the Act of Congress of March 3, 1921, which will be hereinafter referred to.

There was a provision in the Act of Congress of June 28, 1906, for the granting of what is called a "certificate of comeptency" to members of the Osage tribe of Indians by the Secretary of Interior upon application of said Indians provided the Secretary of the Interior found the applicant fully competent and capable of transacting his or her own business and caring for his or her own affairs. Said provision is the seventh paragraph of section 2 of the Act of Congress of June 28, 1906 (34 Stat. L. 539) and reads as follows:

"That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain inalienable and non-taxable for a period of twenty-five years, or during the life of the homestead allottee, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs; *provided*, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States; *provided*, that the surplus lands shall be non-taxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress; and *provided further*, that nothing

herein shall authorize the sale of the oil, gas, coal or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided: and *provided further*, that the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

It will be noted that the privilege granted by such certificate of competency was that the Indian was permitted to sell and convey any of the lands deeded him by reason of said Act except his homestead, and that was the extent of the difference between a member of the tribe who was granted a certificate of competency and one who was not—in all other matters, they were the same.

The question as to the effect of the granting of a certificate of competency was before the Supreme Court of Oklahoma in the case of *Neilson* v. *Alberty*, 36 Okl. 490, 129 Pac. 847. In passing upon the question of the effect of the granting of a certificate of competency, the court said:

"While we entertain no doubt on the conclusions reached, yet, if a doubt existed, it is one that under the uniform holdings of the Supreme Court of the United States for more than 100 years must be resolved in favor of the defendant in error. *Tiger* v. *Western Investment Co.*, 221 U. S. 298, 31 Sup. Ct. 578, 55 L. ed. 738; *Choate* v. *Trapp*, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. ed. 941; *United States* v. *Celestine*, 215 U. S. 278, 30 Sup. Ct. 93, 54 L. ed. 195. We do not believe the

statute authorizing the issuance of certificate of competency can be given greater effect than the words used by their clear meaning import. There is a material distinction between the removal of restrictions on alienation of allotted lands and the issuance of a certificate of competency, predicated upon the applicant being competent and capable of transacting his own business and caring for his own affairs; and this is particularly true when the effect of the issuance of the certificate is defined in the act itself. Congress acted within the scope of its reserved power in the passage of the Allotment Act. It was for the Osage Indians and their benefit and advancement that it undertook to legislate, and not for their creditors. The latter would be no worse off than at the time of the creation of the obligation upon which the judgment was obtained."

And this construction has been followed by that court ever since.

The Act of April 18, 1912 (37 Stat. L. 86, section 3), gives the County Courts of Oklahoma jurisdiction in probate matters to appoint guardians and administer all estates of the allottees of said tribe without regard to the facts as to whether or not a certificate of competency has been issued. It provides that a copy of all papers filed in the County Court (in such cases) shall be served upon the Superintendent of the Osage Agency at the time of the filing thereof, and the Superintendent is authorized whenever the interest of the allottee requires to appear in said court for the protection of the allottee's interest.

Section three of said Act reads as follows:

"*Sec. 3.* That the property of deceased and of orphan minor, insane or other incompetent allottees of the Osage tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the County Courts of the State of Oklahoma, but a copy of all papers filed in the County Court shall be served on the Superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottees require, to appear in the County Court for the protection of the interests of the allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the Superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the County Court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the County Court shall determine. Every bond of

the executor, administrator, guardian or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *provided*, that no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *provided further*, that no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior."

It will be noticed that this act makes no distinction between these members of the tribe that have a certificate of competency and those that do not have the same. If the petitioner is not a ward of the government what authority has Congress to authorize the Superintendent of the Osage tribe of Indians to superintend and control a proceeding instituted by or against him in the County Court of Oklahoma? Prior to the passage of this act the state courts had no jurisdiction over an Osage Indian estate.

Section 8 of the same act is as follows:

"That any adult member of the Osage tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will in accordance with the laws of the State of Oklahoma: *Provided*, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

Prior to this enactment, an Osage could not make a valid will nor can he now, without the approval of the Sec-

retary of the Interior, even though he has a certificate of competency.

Under the Act of March 3, 1921 (41 Stat. L. 1249), section 3, all members of the tribe without regard to whether they have certificates of competency are made citizens of the United States, but the act provides that this shall not affect their interest in tribal property or control of the United States over such property.

Under the Act of February 27, 1925 (43 Stat. L. 1008), section 4, the Secretary of the Interior is authorized to revoke a certificate of competency issued to a member of the Osage tribe of more than one-half Indian blood. Congress in the exercise of its power could legislate the same way with reference to Indians of less than half blood.

Section 5 of this act is as follows:

> "No person convicted of having taken, or convicted of causing or procuring another to take, the life of an Osage Indian shall inherit from or receive any interest in the estate of the decedent, regardless of where the crime was committed and the conviction obtained."

Also, section 7 is as follows:

> "Hereafter none but heirs of Indian blood shall inherit from those who are one-half or more Indian blood of the Osage tribe of Indians any right, title, or interest to any restricted lands, moneys, or mineral interests of the Osage tribe: *provided*, that this section shall not apply to spouses under existing marriages."

These acts are cited to show that Congress has consistently dealt with the petitioner, he being an Osage In-

dian by blood (although with a certificate of competency), as being a ward of the government. It is for Congress to say when the wardship shall cease.

—*Ramsey* v. *United States*, 271 U. S. 468, 70 L. ed. 1039;

In re Dennison, 38 Fed. (2nd Series) 662.

The question of the status of members of the tribe has been before the Federal District Court and the Supreme Court of the United States. In the case of *LaMotte & LaMotte* v. *United States*, 254 U. S. 570, 65 L. ed. 410, and dealing with the status of members of the Osage tribe the Supreme Court used this language:

> "The Osages have not been fully emancipated but are still wards of the United States."

This quotation, of course, referred to members of the tribe having certificates of competency for, in that case, there was no contention that an Indian of the Osage tribe who did not have a certificate of competency was not fully and completely under the control and jurisdiction of the United States.

In the more recent case of the *United States* v. *John Ramsey and Wm. K. Hale*, 271 U. S. 468, 70 Law ed. 1039, the Supreme Court of the United States had before it the question of validity of an indictment against John Ramsey and Wm. K. Hale, both white men who were charged with the murder of Henry Roan, a full blood Osage Indian who had a certificate of comeptency. The murder was alleged to have been committed on an allotment belonging to another

member of the Osage tribe of Indians who did not have a certificate of competency. It was the contention of the counsel for Ramsey and Hale that the United States did not have jurisdiction of the case because, *first*, that the land where the homicide was committed was not Indian country and, *second*, because the United States no longer had jurisdiction of the offenses of this character committed in Osage County, Oklahoma. This involved the question not only of the status of the land but of the status of the members of the Osage tribe of Indians. The fact that Henry Roan had a certificate of competency was not given any consideration by the Supreme Court, but the case was considered from the standpoint of the federal statutes with reference to the offenses committed in Indian country, the court holding that the allotment in question was Indian country because it was still subject to supervision and control of the Secretary of the Interior; also, under the statute which makes it a violation of the federal law in a state to kill an Indian in Indian country within the limits of the state. The court held the indictment to be good and directed the trial of Ramsey and Hale in the federal courts. In discussing the question of the status of the Indians in the opinion, the court said:

> "But the authority in respect of crimes committed by or against Indians continued after the admission of the state as it was before (*Donnelly* v. *United States*, 228 U. S. 243, 271, 57 L. ed. 820, 832, 33 Sup. Ct. Rep. 449, Ann. Cas. 1913-E, 710), in virtue of the long settled rule that such Indians are wards of the Nation in respect of whom there is devolved upon the Federal

Government 'the duty of protection, and with it the power' (*United States* v. *Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109). The guardianship of the United States over the Osage Indians has not been abandoned; they are still the wards of the Nation (*United States* v. *Osage County*, 251 U. S. 128, 133, 64 L. ed. 184, 187, 40 Sup. Ct. Rep. 100; *United States* v. *Nice*, 241 U. S. 591, 598, 60 L. ed. 1192, 1195, 36 Sup. Ct. Rept. 696), and it rests with Congress alone to determine when that relationship shall cease (*Re Heff*, 197 U. S. 488, 499, 49 L. ed. 848, 853, 25 Sup. Ct. Rept. 506; *United States* v. *Celestine*, 215 U. S. 278, 290, 54 L. ed. 195, 199 30 Sup. Ct. Rep. 93)."

The District Court of the United States for the Western District of Oklahoma in *Quarles* v. *Dennison*, 38 Fed. (2nd Series) 662, in a bankruptcy case involving an Osage Indian with a certificate of competency, in paragraphs one and two of the syllabus states the status of the bankrupt as follows:

"A 'comeptent' Osage Indian is one having certificate of competency which gives him certain rights as to disposal of his property."

"Under Osage Allotment Act (Act June 28, 1906, 34 Stat. 539) and amendments thereto, Act of March 3, 1921, 41 Stat. 1249, and Act of March 2, 1929, 45 Stat. 1478, an Osage Indian of less than half blood with certificate of competency, or with restrictions removed, does not have right to dispose of his trust fund or his trust estate."

And, in the opinion in the case with reference to the status of the bankrupt, the court said:

"Counsel for the trustee insist in their brief that a member of the Osage tribe, of less than half blood, who has received a certificate of competency, has all the rights of a white man, and that he can dispose of any of his property. I cannot agree with the learned counsel, nor do I find any decisions which were cited in their brief to justify that contention. A member of the tribe receiving a certificate of competency could, prior to the Act of March 3d, 1921, dispose of any property which he had, including his surplus land, but could not dispose of his homestead during the trust period.

"Section 3 of the Act of March 3d, 1921 (41 Stat. 1249) gave to an Osage Indian of less than half Indian blood the additional right to dispose of his homestead, but no power was given in this act or any other act to dispose of or incumber in any way his interest in the trust estate."

A fair construction of the various Acts of Congress with reference to the Osage tribe of Indians will disclose that Congress has been very slow in relieving itself of its duties and obligations toward the tribe and its members or as has been said "slow in emancipating them." It has granted to certain members certificates of competency authorizing such members to do certain things without being controlled by the United States; it has declared all members of the tribe to be citizens of the United States, but has specifically reserved to the Government the control and management of the tribe's affairs; it has given to the County Courts of Oklahoma jurisdiction with reference to the estates of deceased members of the Osage tribe of Indians, and with reference to guardianships, with certain limita-

tions and restrictions. For instance, it has provided that copies of all papers must be served upon the Superintendent of the Osage tribe of Indians, and this has been held to be a condition precedent to the County Court obtaining jurisdiction over Osage estates or to act on the same.

In the case of *In re Guardianship of Winnett, Wright, Superintendent,* v. *Riber, et al.,* 112 Okl. 43, 239 Pac. 603, the Supreme Court of Oklahoma held that the Superintendent of the Osage Agency is a necessary party to the proceedings and is entitled to notice. In the opinion, the court says:

> "The superintendent is therefore a necessary party to the action so far as the notice of its pendency is concerned, and his plea to the jurisdiction of the court and to the hearing being had on the date the petition was filed was proper and timely."

In the case of *In re Pitts, Wright, Superintendent,* v. *Citizens Trust Company,* 115 Okl. 116, 242 Pac. 1036, the Supreme Court of Oklahoma held that it was necessary for copies of all papers in guardianship matters to be filed with the Superintendent of the Osage Agency as required by Act of Congress of April 18, 1912, before the court could acquire jurisdiction. In the opinion, the court says:

> "The first proposition presented by the appellant is that the Superintendent of the Osage Agency is a necessary party to every proceeding in the County Court respecting the property of a deceased or orphan minor, insane, or other incompetent allottees of the Osage tribe of Indians, and that, as it is admitted, no notice of the application of the Citizens Trust Com-

pany, guardian, was had upon the Superintendent of the Osage Agency, the County Court was deprived of jurisdiction to make the order complained of and the District Court of Osage County was without jurisdiction to approve the said order of the County Court."

It has also provided that guardians for members of the Osage tribe of Indians of one-half or more Indian blood, whether they had certificates of competency, or not, could not be appointed without the approval of the Secretary of the Interior. In section one of the Act of February 27, 1925 (43 Stat. 1008), is found this language:

> "No guardian shall be appointed except on the written application or approval of the Secretary of the Interior for the estate of a member of the Osage tribe of Indians who does not have a certificate of competency, *or who is of one-half or more Indian blood.*"

It is also provided in section one of said Act:

> "All payments to legal guardians of Osage Indians shall be expended subject to the joint approval in writing of the court and the Superintendent of the Osage Agency."

Prior to authorizing the County Courts of Osage County and Oklahoma, to assume jurisdiction in these matters, the courts had no jurisdiction over the affairs of the Osage tribe of Indians, and all the affairs of the Osage tribe of Indians were subject to disposal by the Secretary of the Interior whose duty it was, prior to authorizing the courts to settle estates, to determine the heirs and settle the estates of the deceased members of the tribe. This petitioner can not make a valid will with reference to his property

without the approval of the Secretary of the Interior under the Act of Congress of April 18, 1912, hereinbefore referred to. How it can be said that the status of this petitioner is that of a white man or that he is no longer a ward of the Government is beyond comprehension in view of the various Acts of Congress and the various decisions of the courts with reference thereto.

Under the Act of Congress of April 12, 1924 (43 Stat. L. 94) it is provided "that any right to, or interest in, the lands, monies, or mineral interests as provided in the Act of Congress approved June 28, 1906, entitled 'an act for the division of the lands and funds of the Osage Indians in Oklahoma, and for other purposes' and acts amendatory thereof or supplemental thereto, vested in, determined or adjudged to be the right or property of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned, and transferred under such rules and regulations as the Secretary of the Interior may prescribe." Congress here definitely provided a means for those of non-Indian blood, who inherited or received by will property of members of the Osage tribe of Indians to sell or dispose of the same subject to the approval of the Secretary of Interior and not otherwise. This Act of Congress further demonstrates the status of a member of the tribe having a certificate of competency with reference to his part in the tribal property. It is a well established principle of law that, where there is an Act of this kind authorizing certain classes to do certain things, it has the effect of preventing other classes not given this

privilege from doing the same thing and clearly demonstrates that no member of the tribe whether with or without a certificate of competency could in any wise sell or dispose of his interest in the tribal property.

III.

The income received by the Osage Tribe of Indians is income which Congress may not impose a tax against under the Constitution of the United States.

By these various treaties, the Osages without any adequate consideration other than the guaranty of the United States to protect the tribe, ceded vast tracts of land to the United States, comprising the greater part of the States of Missouri and Arkansas, a large part of Kansas, and a considerable portion of Oklahoma.

The United States will not violate its trust obligations to this tribe. Neither can it be disputed that the tribe is a distinct political entity, dependent, it is true, but of specific, different character from every other class.

Except from the general status of an Indian tribe, and the members thereof as disclosed by the decisions of this court, the early history of the Indians and their relations to the Government of the United States, there is little to be found bearing directly upon the question as to whether Congress could or could not impose a direct tax on them. Evidently, however, the framers of the constitution were of the opinion that Indian tribes and the members thereof would not be subject to taxation for it is provided in section 2, article 1 of the Constitution, that apportionment of repre-

sentatives and direct taxes shall be made among the states, "*excluding Indians not taxed.*" No other persons were excluded. Evidently the use of the term "excluding Indians not taxed" in connection with the term "direct taxes" implies the proposition that Indians were not to be taxed either by the state or by the federal government. Tribal Indians were "Indians not taxed." (*Elk* v. *Wilkins*, 112 U. S. 94, see also dissenting opinion.) The Sixteenth Amendment to the Constitution of the United States was adopted in order to get rid of the proposition of apportionment of taxes and did not extend the power of Congress to new subjects of taxation.

—*Peck* v. *Lowe*, 247 U. S. 165;
Stanton v. *Baltic Mining Co.*, 240 U. S. 103;
Eisner v. *Macomber*, 252 U. S. 189.

Congress has not attempted to tax the Osage Indians.

The exemption of the Indian from federal taxation also grows out of treaty relations between the United States and the Indians and the status of tribes and members thereof at the time of the adoption of the constitution and since. These treaties are the supreme law of the land. They supersede all prior acts of Congress. No repeal is inferred from general statutes. Ordinarily a repeal must be express and specific. Until this is done, the treaty remains the supreme law. Such repeals are never favored. A breach of good faith is not lightly imputed to Congress.

Such being the case, it is not to be presumed that Congress, by enacting a general tax law, *intended to repeal a*

treaty or to modify it in any particular. A conflict between a special treaty and a general law is to be avoided, if any reasonable interpretation will avoid it. In construing the language of Congress, it may properly be assumed that Congress did not intend a gross breach of faith.

These considerations have given rise to the settled rule that general statutes of Congress are not to be taken as applying to the Indian tribes unless it appears that the attention of Congress must have been particularly directed to the prior specific laws or treaties protecting the Indians.

—*Elk* v. *Wilkins*, 112 U. S. 94;
Washington v. *Miller*, 235 U. S. 422, 428;
Choate v. *Trapp*, 224 U. S. 665.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 94, has never been questioned:

> "The Indian tribes, being within the territorial limits of the United States, were not strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General Acts of Congress did not apply to Indians, unless

so expressed as to clearly manifest an intention to include them."

In 14 R. C. L., page 125, paragraph 21, it is said:

"It has been determined that Congress cannot be supposed to grant Indian country by a law general in its terms; specific language, leaving no room for doubt as to the legislative will, is required for such a purpose."

And on page 116, 14 R. C. L., it is said:

"Because of the unequal situation of the contracting parties, the language used in treaties with Indians should never be construed to their prejudice."

Section 71, Title 25, U. S. Code (R. S. 2079), provides:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

Under the Constitution of the United States and the general policy of the government in all of its dealings with Indian tribes, the same was done by treaty. The policy of the government was changed so that in place of treaties all matters relating to Indian tribes and Indians were cared for by Act of Congress. Manifestly it was not intended that any general Act of Congress which does not specifically refer to Indian tribes or Indians shall include them. This

section did not change the relation of the Indian tribes to the United States.

—*Elk* v. *Wilkins*, 112 U. S. 94.

At this point it might be well to call the attention of the court to the status of members of the Osage tribe of Indians. The petitioner is a member of the Osage tribe of Indians. He and his interest in tribal property are subject to the control of the United States. The Osage Indians still maintain their tribal organizations and tribal relations. That members of the tribe have not been released from the guardianship or control of the Unted States. *LaMotte* v. *United States*, 254 U. S. 570; *United States* v. *Ramsey*, 271 U. S. 467. Prior to March 3rd, 1921, members of said tribe were not citizens of the United States. In that act it is provided:

> "That all members of the Osage tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law."

The only way in which an Osage Indian could become a citizen of the United States and at the same time still maintain his tribal relations was by Act of Congress.

31 Corpus Juris, 432, in which it is said:

> "As a general rule an Indian is not a citizen of the United States by birth, because not born 'subject to the jurisdiction thereof,' but it has been held that an Indian born in the United States, of a tribe which has ceased to maintain its tribal integrity, and who is sub-

ject to the laws of the state in which he lives, is a citizen. An Indian cannot make himself a citizen without the consent and co-operation of the government. He may be naturalized, either individually or through collective naturalization effected by treaty or statute."

—*Elk* v. *Wilkins*, 112 U. S. 94, 28 L. ed. 643.

Vol. 14, R. C. L, page 117, in which it is said:

"An Indian is not, by virtue of his membership in a tribe residing within the limits of this country, a citizen of the United States, nor can he put off his alien and dependent condition at his own will, without the action or assent of the United States. But he may, like the subject of another foreign government, be naturalized by the authority of Congress, and become a citizen of a state and of the United States."

Vol. 14, R. C. L., page 118, in which it is said:

"The fourteenth amendment to the federal constitution provides that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' It has been definitely decided that this amendment does not operate to grant citizenship to the Indians, for the reason that Indians, born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian tribes, although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the 14th amendment than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations."

The question of Citizenship of an Indian and how he may become a citizen of the United States gives added explanation to the status of an Indian tribe and the members thereof. Citizenship does not change the status of an Indian (*United States* v. *Nice*, 241 U. S. 591, 60 Law ed. 1195; *United States* v. *Celestine*, 215 U. S. 278, 54 Law. ed. 199; *Winton* v. *Amos*, 255 U. S. 375.) The United States has reached out and put its protecting arm around the Indian tribes and the members thereof and has taken them and their property under its guardianship in consideration of the Indians ceding to the United States substantially all of their possessions in order that the United States might be able not only to advance them in civilization, but that it might build and maintain a great country. Under the treaties between the various Indian tribes and the United States, and the concessions and agreements made therein by the respective parties, the United States is now, and always will be as long as there is an Indian, *the debtor of the Indian tribes and their members.*

It is contended by the respondent that since the revenue acts under which this tax is sought to be collected provide that the entire net income received in the preceding calendar year from all sources by every individual, citizen, or resident of the United States is subject to an income tax that this language includes the individual members of the Osage tribe of Indians. This overlooks the well established rule of construction, as announced by the Supreme Court, that the general Acts of Congress do not apply to Indians,

unless so expressed as to clearly manifest an intention to include.

In *Choate* v. *Trapp*, 224 U. S. 665, the court said:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized without exception, for more than a hundred years and has been applied in tax cases.

"For example, in *Kansas Indians (Blue Jacket* v. *Johnson County)*, 5 Wall. 737, 760, 18 L. ed. 667, 674, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale of state taxes. The rule of strict construction would have compelled a holding that the property was liable. But Justice DAVIS, in speaking for the court said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice MARSHALL, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of which are susceptible of a more extended meaning.' Again, in *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their

favor in determining the rights to the Choctaws and Chickasaws."

—*Elk* v. *Wilkins*, 112 U. S. 94;

14 R. C. L., page 125, paragraph 21.

"Every indiviual" is broad enough to include the officials and instrumentalities of the states, but the judiciary may well assume and does assume that Congress never intended to extend the statute to objects beyond its constitutional power, and, again, *if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.*

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject-matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punish all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *United States* v. *Kirby*, 7 Wallace 482, to exemplify the rule that:

"The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of The Holy Trinity* v. *United States*, 143 U. S. 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services of any kind in the United States."

The question arose whether the migration under contract to this country of a clergyman to serve as pastor of Holy Trinity Church of New York City, was a violation of this law. According to the literal signification of words, he was clearly within the provisions "to perform labor or services of any kind in the United States," and yet the Supreme Court held that the statute construed in the light of its manifest purposes did not apply to other than manual toilers, Mr. Justice BREWER said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and services both used, but also, as it were to guard against any narrow

interpretation and emphasize a breadth of meaning, to them is added 'of any kind,' and further, as noticed by the circuit judge in his opinion, the fifth section which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intentions of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case."

A notable and more recent illustration of this principle was the case of *United States* v. *Delaware & Hudson Company*, (213 U. S. 366).

In that case the commodity clause of the Hepburn Law made it unlawful for a railroad to transport any commodity "manufactured, mined, or procured by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect, except such ar-

ticles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Literally the act, with its disjunctive provisions, provided that a railroad could not transport any commodity, which it had manufactured, mined or produced, even though at the time of transportation it had ceased to have any interest in it. The question was whether the act applied to coal, which had been mined by a railroad but sold by it before it had entered into transportation.

The Supreme Court, in an opinion by Chief Justice WHITE, disregarded the literal force of the sweeping language of the commodity clause in order to harmonize it with the general policy of this and other statutes, which regulate interstate commerce, and also to avoid the decision of a *grave constitutional question*, to which the literal interpretation would have given rise.

In Black on Interpretation of Laws, 116, the proposition is thus stated:

> "As a corollary from the doctrine that implied repeals are not favored, it has come to be an established rule in the construction of statutes that a subsequent act, treating a subject in general terms and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all."

So in Sedgwick on the Construction of Statutory and Constitutional Law, the author observes, on page 98, with respect to this rule:

"The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all."

But why elaborate the point? The books are full of cases where the literal meaning of statutory language is disregarded by reading into the statute exceptions, which the court knows as matter of common sense the legislature intended. Such a rule of interpretation, without which the administration of justice would lead to the most absurd and oppressive results, has its classic illustration in the interpretation of the constitution itself, for no language is more sweeping than the power given to the United States to tax, and such language, as in this case is strengthened by its own express exceptions. When, therefore, this clause first came to be expounded, it might have seemed plausible to argue that, as the constitution itself made its own exceptions, and otherwise seemingly gave an unlimited power to tax without reservation or qualification, no other exception could be made by implication.

The sound common sense and far-sighted vision of Chief Justice MARSHALL swept away this narrow reasoning in *McCullough* v. *Maryland*, and the instrumentalities of the states were made, by judicial construction, exceptions to

the federal power of taxation in order to bring that sweeping power into harmony with the whole purpose of the constitution. That was an implication similar to the contention in this case, which argues that the general language of a taxing statute shall not be construed to apply to a situation which is manifestly beyond the purview of the statute, and which, if applied literally, would conflict with the historic policy of the nation to preserve, and not to diminish, directly or indirectly, the property of the Indians, or violate its sacred obligations to the Indians.

In *Blackbird* v. *Commissioner of Internal Revenue*, 38 Federal Reporter (2nd Series) 976, (a companion case to this one) the Circuit Court of Appeals said:

> "The mineral reserves under the lands are held in trust by the United States for the tribes and its members, and are being developed under its control and direction as an instrumentality for the best interests and advancement of the members of the tribe who are still recognized as dependents on Governmental care; and it seems unreasonable to hold that a general tax statute should be applied to them when they are not named nor intention is some way expressed that it applies to them."

In 34 Op. A. G. 439, the Attorney General in what is known as the *Quapaw* case said:

> "* * * inalienability and non-taxability should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, by implication, to *impute* to Congress under the broad range of our Internal Revenue Acts, an intent to impose a tax for the benefit of the federal government on *income derived*

from the restricted property of these wards of the Nation." (Italics ours.)

In *Lewellyn* v. *Colonial Trust Co.*, 17 Federal (second) 36, the Circuit Court of Appeals, Third Circuit, dealing with right to tax the Osage Indians, said:

"*Third.* That as legislation imposing taxation by government on citizens must be clear and free from doubts and all doubts therein must be resolved in favor of the citizens, *Gould* v. *Gould*, 243 U. S. 151; *United States* v. *Field*, 255 U. S. 257, any legislation by government imposing taxation on its dependent ward must be in certain and indubitable terms. *Choate* v. *Trapp*, 224 U. S. 665.

"*Fourth.* That in the absence of any expressed purpose of Congress to change the uniform and unbroken policy of the Government to regard and deal with the Indian tribes as wards and dependents, the purpose and intent of Congress to change that policy and impose a tax by Government on its ward will not be implied and the general terms of the income tax statute should not be construed to embrace the Indian wards of the Government. In support of this, reference is made to the Quapaw Indians, 34 Opinions Attorney General, 439, where it is said: 'In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian;' and *Choate* v. *Trapp*, *supra*, where it is said: 'The construction, instead of being strict, is liberal, doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and depend wholly upon its protection and good faith.'

"A conclusion in line with the *United States* v. *Rickert*, 188 U. S. 432, and *Elk* v. *Wilkins*, 112 U. S. 94,

where it is said: 'It is well established that general Acts of Congress do not apply to Indians unless so worded that they clearly manifest an intention to include them in their operation'."

The decision in the *Lewellyn* case was reversed by the Supreme Court (275 U. S. 32) on the ground that a lessee of Indian lands came within the purview of the taxing statute, but did not pass upon the question as to whether Indians came within the purview of the statute.

The United States Board of Tax Appeals bases its decision in this case largely upon the case of *Cherokee Tobacco* v. *United States*, 11 Wall. 616. The *Cherokee Tobacco* case arose under the Act of Congress of June 20, 1868 (15 Stat. at L. 167), which imposed a tax on the manufacture and sale of distilled spirits, fermented liquors, tobacco, snuff, *et cetera*. In that case, because the law provided that an excise tax should be paid on the manufacture and sale of tobacco, in every part of the territory embraced within the limits of the United States, it was held that this included Indian Territory, and that notwithstanding the treaty existing between the Cherokee Indians and the United States to the effect that products of the farms produced by members of the tribe and the manufactured products thereof should not be subject to taxation by the United States, that Act of Congress of 1868 superseded the treaty. However, *Choate* v. *Trapp*, *supra*, has in effect reversed the *Cherokee Tobacco* case.

The decision in the *Cherokee Tobacco* case was by a minority of the court, although a majority of the court sat

on the case. The Supreme Court of the United States disapproved, or rather declined to accept the *Cherokee Tobacco* case as authority in the case of *43 Gallons of Whiskey*, (108 U. S. 491). In that case the court said with reference to the *Cherokee Tobacco* case:

> "The case of *The Cherokee Tobacco Tax*, 11th Wallace 616 (78 U. S. 237), cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it and two dissented from the judgment pronounced by the other four."

Referring to the *Cherokee Tobacco* case, the Circuit Court of Appeals said in the *Blackbird* case:

> "Counsel for respondent rely on *The Cherokee Tobacco* case, 11 Wall. 616, 20 L. ed. 227; but the opinion in that case, as a precedent, seems to have been nullified by what is said in *United States* v. *Forty-three Gallons of Whiskey*, 108 U. S. 491, 2 S. Ct. 906, 27 L. ed. 803. The case of *Mary Blackbird* is therefore reversed."

The question arose, with reference to the Hopi Indians residing upon the Hopi Indian Reservation in Arizona, as to whether the income of said Indians derived by reason of the increase of sheep bought for them by the United States and held in trust on the unallotted lands of the said tribe, was subject to the payment of income tax. The matter was referred to the Attorney General of the United States, and, in an opinion on the question (35 Op. Atty. Gen. 107), the Attorney General said:

"These Indians are yet wards of the nation, in a condition of pupilage or dependency from which they have not been discharged. The legal title to the lands they occupy rest not in them, either individually or as a tribe, but in the United States. Appropriations are annually made for the protection, welfare, education, and civic advancement of these dependent people. By these means the government hopes to encourage industry among the Indians, induce them to maintain permanent homes and families and adopt other habits of civilized life, and eventually fit them to assume the responsibilities of citizenship. To tax them is so inconsistent with the purpose and object of the government in its dealings with these Indians, and the relation that it maintains toward them and their property, that it cannot be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress.

"In view of the foregoing, I am of the opinion that unallotted Indians maintaining their tribal connections and residing on reservations of land set apart by the Federal Government for the tribe of which they are members do not come within the purview of the Federal Revenue Acts, and that, therefore, the income of such Indians derived from the increase of sheep and cattle bought for them by the government, or from business conducted on the reservation by such Indians with other Indian wards of the government, or from any other source herein considered, is not subject to federal income tax."

The same view has been expressed by the Solicitor of the Bureau of Internal Revenue with reference to the Ponca Indians (S. M. 5632).

The case of the *Hopi Indians* is more nearly like the situation with reference to the Osage Indians. Apparently, the sheep bought by the government for the Hopi Indians were held in trust for them, and the Indians received the income therefrom. With reference to the Osage Indians, the oil and gas minerals are unallotted tribal property and are held in trust for them by the United States and the income therefrom received by the United States. After deducting the costs and expenses of the United States in looking after the Osage tribe of Indians, and after deducting the expense of the tribal government, the remainder is distributed among the members of the tribe. It is this money received on distribution that the respondent seeks to tax.

The opinions of the Attorney General of the United States in the *Quapaw* case, and the *Hopi* case, *supra*, were acquiesced in by the Treasury Department of the United States. If it is true that the Quapaw Indians are exempt from the Federal Income Tax on income received from their allotted lands, without there being any specific provision either in the treaties or in the law, other than there being no right in said Indians to alienate their lands; and, if it is true that the same is the law with reference to the Ponca Indians on their allotted lands held in trust for them, then it would seem that there is much greater reason to believe that the income of the Osage tribe of Indians could not possibly be included in any of the terms of any of the Federal Income Tax Laws, without regard as to whether Congress could impose the tax; and if it is true that the income of the Osage tribe of Indians, received for it by the United States,

and held in trust for the members thereof until distributed, is not subject to Federal Income Tax, then such income, when distributed among the members of the tribe, could not, by any course of reasoning, be held subject to the payment of income tax.

On May 19th, 1930, Congress passed a joint resolution, indicating the policy of the Government toward the Indians:

"(Public Resolution—No. 74—71st Congress) (S. J. Res. 163) Joint resolution to carry out certain obligations to certain enrolled Indians under tribal agreement.

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that any person duly enrolled as a member of an Indian tribe who received in pursuance of a tribal treaty or agreement with the United States an allotment of land which by the terms of said treaty or agreement was exempted from taxation, and from which land the restrictions have been removed, and who was required or permitted contrary to such stipulation to pay any illegal or unauthorized Federal tax on the rents, royalties, or other gains arising from such tax exempt lands during the period of such exemption and who would be entitled under the law and rulings of the Treasury Department in similar Indian cases to a refund of the taxes so illegally or erroneously collected but for the fact that he failed to file a claim for such refund within the time prescribed by law, shall be allowed one year after the approval of this Act within which to file such claim, and if otherwise entitled thereto he may recover such illegal taxes in the same manner and to the same extent as if such claims for re-

fund had been theretofore duly filed as required by law, *it not being the policy of the Government to invoke or plead a statute of limitations to escape the obligations of agreements solemnly entered into with its Indian wards: Provided, however,* that in the case of the death of any such person such illegal taxes paid by him or on his account may in like manner be claimed and recovered by the person or persons who would have received such money had it constituted a part of his estate at the time of his death.

"*Sec. 2.* That all Acts and parts of Acts in conflict herewith are modified for the purpose, and only for the purpose, of carrying into effect the provisions hereof.

Approved May 19, 1930." (Italics ours.)

IV.

The income of the tribe not being subject to a tax it cannot become subject to tax upon distribution to the members thereof.

If our position is correct, as hereinbefore set forth, that the income of the tribe is not subject to taxation, whether it be from want of power in Congress to provide for the taxing of the same or whether it be because Congress did not intend to tax the same, necessarily it would follow that this income when distributed among the members of the tribe is not subject to tax, because if it were taxed it would defeat the purpose of Congress in not attempting to tax it, or it would be taxing income which was immune from taxation at its source.

—*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429.

In the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, it is said:

> "But it may be argued that the *Pollock* case was decided, before the passage of the Sixteenth Amendment to the Constitution, authorizing the Income Tax Law. In *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1, which was the first case after the adoption of the Sixteenth Amendment involving the constitutionality of the Income Tax Act, the Supreme Court decided that the amendment did not confer upon Congress any new taxing power but served only to remove the limitation with reference to apportionment. It thereby removed the obstacle pointed out in the *Pollock* case, but did not change the law that *where the source is not taxable neither is the income.*" (Italics ours.)

Since the argument heretofore set out in this brief applies in principle to this proposition, it is not thought necessary to dwell at length upon the same. The control of the United States over property as a guardian which it holds in trust for a tribe of Indians or the members thereof is the same in principle, so far as burdening the property with taxation is concerned, as property owned by the United States.

In 37 Cyc, page 865, it is said:

> "The United States has no authority to tax the property of the state, nor has the state power to extract revenue from the property of the Federal Government, and from the nature of the case, neither will lay taxes upon its own property."

All that has heretofore been said with reference to the non-taxability of the funds coming to the petitioner by reason of his allotment as a member of the Osage tribe of Indians applies equally to the funds received by him as an heir of a member of the Osage tribe of Indians, and to interest on trust funds and rents from lands held in trust.

—*United States* v. *Bean*, 253 Fed. 1;
Brader v. *James*, 246 U. S. 88, 62 L. ed. 591;
Tolley v. *Burgess*, 246 U. S. 104, 62 L. ed. 600.

Section six of the Act of Congress of June 28, 1906, authorized members of the tribe to make wills, subject to the approval of the Secretary of the Interior, and in such wills the individual allottee may dispose of his or her lands, monies and mineral interests as provided for in said Act of Congress.

Section five of said act provides that after the period of twenty-five years the lands, monies and mineral interests referred to in said section shall become the absolute property of the individual allottees or their heirs.

Section seven provides that the surface of the land is set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or their heirs, for twenty-five years from January 1st, 1907, but that leases on said lands by the allottee, or heirs, are subject to the approval of the Secretary of the Interior.

By the Act of Congress of March 3rd, 1921, a distinction was made between members of the tribe and their heirs who do not have certificates of competency and those who do have certificates of competency, in that, where members

of the tribe have certificates of competency they shall continue to receive the full amount of their interest in the accumulated funds of the tribe quarterly, while, if they do not have certificates of competency, they may only receive $1,000.00 quarterly, the remainder of the accumulated funds belonging to such Indian, whether coming from his own allotment or as an heir of another Indian shall be disposed of by the Secretary of the Interior as provided in said act and held in trust for the benefit of such Indian. The status of an Indian with a certificate of competency was not changed.

The statutes clearly place the inherited interests received by members of the Osage tribe of Indians in exactly the same status as in the share or allotment of such member. The matter was specifically dealt with in the case of *LaMotte v. United States*, 256 Fed. 5. Paragraph three of the syllabus in said case reads as follows:

> "Under First Allotment Act, June 28, 1906, sections 2-7, 12, held that the Secretary of the Interior is required to approve a lease of lands allotted under the statute and held by minors or other incompetent Indians, whether such lands came to them by allotment, descent, or devise, and whether the lease was arranged by a parent, guardian, or administrator, who might or might not be a non-member of the tribe, or an Indian certified as competent, or was approved by the state County Court."

This case was taken on appeal to the United States Supreme Court and is found in 254 U. S., page 570, 65 L. ed. 410, wherein the position taken by the Circuit Court of Ap-

peals for the Eighth Circuit with reference to the status of the heirs was approved. The *LaMotte* case did not deal with the disposition of the tribal funds, but had to do with the control and jurisdiction of the Secretary of the Interior over the allotted lands, whether in the hands of the original allottee or an heir of such allottee.

V.

Funds received by members of the Osage Tribe of Indians from tribal sources is in the nature of a gift and not an income.

Prior to the Act of Congress of June 28, 1906, which allotted the lands and the funds of the Osage tribe of Indians, the members of the tribe had no individual interest in or to the tribal property further than to receive a distributive share of the income of said tribe. Whether the individual received a distributive share or not, it was subject to whatever Congress might see fit to do with reference to the same. Congress could provide for any number of distributions that it saw fit, or it could provide for the funds to accumulate for the benefit of the tribe, and not pay out anything at all to the members thereof. Said Act of Congress did not allot the minerals, but reserved them for the tribe. The nature of the title to said minerals was not in the least changed by Congress in alloting the lands to the members of the tribe.

Under the allotment act each member of the tribe received his distributive share, except in cases of minors, whose share was paid to their parents, until the Act of Congress of March 3, 1921, when a change was made so that a

member of the tribe with a certificate of competency received his proportionate part of the tribe's income and a member, who did not have a certificate of competency, received only $1000.00 per quarter, and the remainder of his proportionate part was set aside for him to be invested by the Secretary of the Interior for his benefit as provided in said act, and the income of minor members of the tribe, except a portion of which was to be paid to parents or legal guardian for their support, was also withheld and invested for the benefit of such minors.

The position of a member of the tribe toward the tribe is in no wise similar to the position of a stockholder or shareholder in any business enterprise. A shareholder or stockholder in a business enterprise has a vested interest to the extent of his stock, which cannot be taken away from him by law. The interest of a member of the tribe, as provided by various acts of Congress, in the tribal income may be taken away from him by Act of Congress and held exclusively as tribal property for the use and benefit of the tribe as a whole. To distribute this among the members of the tribe is purely a gift to them, and does not come within the definition as provided by law as to what is income. Under the statute in force at the time involved in this case, it was provided:

> "The net income of a taxable person shall include gains, profits and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce or sales, or dealings in property, whether real or personal, growing out of

the ownership of use of or interest in real or personal property, also from interest, rent, dividends, securities or the transaction of any business carried on for gain or profit or gains or profits and income derived from any source whatever."

It is also provided in the Act of September 8, 1916, that among the exemptions in taxation should be:

"The value of property acquired by gift, bequest, devise, or descent."

Taking into consideration the plenary power of Congress over Indian tribes and their property and the right to handle the affairs and business of the tribes as they see fit, it would seem to be a necessary conclusion that funds of the tribe distributed to the members thereof could only be a gift, and as a gift would not under the law be subject to the payment of income tax.

It is, therefore, respectfully submitted that the decition of the Circuit Court of Appeals for the Tenth Circuit should be reversed and the funds or income of this petitioner derived from the source from which it came be held to be non-taxable.

T. J. Leahy,
Pawhuska, Oklahoma,
C. S. Macdonald,
Pawhuska, Oklahoma,
James H. Maxey,
Tulsa, Oklahoma,
F. W. Files,
Pawhuska, Oklahoma,
Louis N. Stivers,
Osage Tribal Attorney,
Pawhuska, Oklahoma.